graph Co. v. *Van Cleave*, 54 S. W. 827 (Ky.); *Pugh* v. *City, etc., Telephone Co.*, 9 Cincinnati Weekly Bul. 104. Both are subject to legislative control as to rates and regulations. *State* v. *Western Union Telegraph Co.*, 113 N. C. 213; *Hockett* v. *State*, 105 Ind. 250. In a recent South Carolina decision it is said that telephone companies are under a duty at common law to furnish facilities to the public without discrimination, and this obligation is placed upon the ground that they are in one sense of the term common carriers. *State* v. *Citizens' Telephone Co.*, 39 S. E. Rep. 257. The tendency to rest the legal status of telegraph and telephone companies upon the similarity of their undertaking to that of the common carrier is unfortunate as ignoring broad principles of law that determine the rights and duties of both callings. The common carrier is only one of a class of public servants endowed by the common law with special privileges and subject to special obligations by reason of the public interest in the proper conduct of the business undertaken. This class anciently included innkeepers, smiths, farriers, tailors, carriers, and others. See 11 HARVARD LAW REVIEW, 163. With the progress of civilization and the development of new countries the number of public employments increased. It was the province of the courts to determine what was a public occupation, and the decisions naturally varied with the conditions and interests of the localities in which they were rendered. *Lake Koen Navigation, etc., Co.* v. *Klein*, 65 Pac. Rep. 684 (Kan.). Among the undertakings that have been held to be public in this country may be mentioned the supplying of water, gas, electricity, and news, and the operating of grain-elevators, grist-mills, telegraphs, and telephones. It is characteristic of persons or corporations engaged in a public occupation that they may take by eminent domain; that they are subject to the control of the legislature in many ways unknown to ordinary business corporations; and that they must serve the public at reasonable rates and without unfair discrimination. *Olmsted* v. *Proprietors of the Morris Aqueduct*, 47 N. J. L. 311. The common carrier in addition to the general privileges and obligations of public servants is under an absolute liability, except for the act of God or public enemy, for the safe delivery of goods intrusted. *Chevallier* v. *Straham*, 2 Tex. 115. It has been pointed out that this so-called insurer's liability of the common carrier is peculiar to him, and is to be traced to an accidental development of the common law rather than to the nature of his occupation. 11 HARVARD LAW REVIEW, 158–168. While the carrying of messages by electricity bears a striking similarity to the undertaking of the common carrier, it lacks one feature without which the insurer's liability of the latter would never have arisen, namely, a bailment of the thing to be conveyed. It is accordingly well settled that telegraph companies are not under the insurer's liability of common carriers. *Grinnell* v. *Western Union Telegraph Co.*, 113 Mass. 299. It seems preferable therefore to rest the status of telegraph and telephone companies upon the public nature of their occupations rather than upon the theory that they are common carriers, a theory not borne out by the decisions and based upon an analogy in one respect at least defective.

THE TAFF VALE RAILWAY CASE. — A recent decision of the House of Lords immediately involving the legal status of English trade unions

and incidentally the liability of all unincorporated associations has excited unusual interest in both England and the United States. *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426. The plaintiff company's property having been illegally picketed by agents of the defendant society — a registered trade union — an interim injunction against the agents personally and against the society in its registered name was granted by Farwell, J. An application of the society to have its name stricken out was dismissed. The only point argued here or in the higher courts was the amenability of the union to an injunction in its registered name. This decision, reversed in the Court of Appeal, was restored by the House of Lords. Mr. Justice Farwell regarded the union as a legal entity — an idea expressly repudiated by the Court of Appeal. In the House of Lords the Chancellor and Lords Brampton and Shand distinctly inclined to that view however. Although the opinions of Lords Macnaghten and Lindley were ambiguous on this point, the latter thought the individual members would not be liable at law for the acts of the society. But the meaning and scope of the injunction were not accurately defined by any of the judges who considered the case.

That men by forming an association can free both themselves and the association from liability for the acts of their agents cannot be the law, in the absence of legislative enactments plainly to that end. For its clear assertion of this principle the present case is admirable. But in the important practical question of determining who is responsible for the acts of an organized association, under given circumstances, the opinions help little. A main factor in answering this question is the legal character of the association. If the body is one recognized by the law as a distinct entity, that entity alone is primarily liable, and the individual members are liable only secondarily if at all. An injunction against the association like a judgment would usually affect directly only the association, and not the members. So if the members as individuals and not as agents of the association should do acts prohibited by the injunction, they would not be liable for violation of the injunction, although under some circumstances possibly liable for contempt of court. See *Lord Wellesley* v. *Earl of Mornington*, 11 Beav. 180, 181; *Avory* v. *Andrews*, 30 W. Rep. 564; *Mayor, etc.*, v. *New York, etc., Co.*, 64 N. Y. 622. On the other hand, if the body is legally not an entity, but a mere collection of individuals, these individuals are primarily liable for their agents' acts. If it be impracticable to join all these individuals as defendants, courts of equity find no difficulty in allowing some to represent all. See *Meux* v. *Maltby*, 2 Swanst. 277.

The orthodox doctrine of the common law, which recognizes only individuals and corporations as entities, undoubtedly lags far behind the ordinary conceptions of laymen. The principal case is indicative, perhaps, of a tendency to abandon this doctrine whenever justice or expediency requires it. Before the Trade Union Acts of 1871 and 1876 trade unions were as entities hardly distinguishable from other unincorporated associations. So far, however, as their purposes were in restraint of trade — and this was a main object of most of the societies — the unions were illegal. The Act of 1871 provided that the purposes of trade unions should not be deemed unlawful merely because in restraint of trade. The Acts further provide certain formal requirements in regard to the registration of trade unions, and prescribe the mode in which the

property of the unions shall be held by trustees. It is not expressly stated that registered unions may be sued by their registered names. The Acts in no way create trade unions, they simply regulate the trade unions hitherto existing. From this case it would appear that statutory regulation of unincorporated associations less than that usually believed requisite to create corporations may suffice to induce the English courts to recognize them as legal entities. Public policy would not prevent the courts from going still further in making the law in regard to associations accord with the actual facts.

SUBSCRIPTIONS TO CHARITABLE ORGANIZATIONS. — Theory and decision are unfortunately in irreconcilable conflict in the majority of instances where charitable subscriptions have been enforced. In a late case a subscription for the purchase of a church site is held binding, on the ground that the consideration for the defendant's promise is to be found in the meritorious object of the subscription and in the mutual promises of the subscribers. *First Church* v. *Pungs*, 86 N. W. Rep. 235 (Mich.). Although many authorities accord with this decision it is impossible to agree with it unless it can be rested on other grounds than those stated. To support the subscriber's promise a consideration must move from the other contracting party, — in conventional phrase, the promisee must incur a detriment at the request of the promisor. 12 HARVARD LAW REVIEW, 515. Ordinarily the subscription paper contains, in express terms at least, neither a request by the subscriber nor a promise by the beneficiary. The subscription usually is a mere gratuity. *In re Hudson*, 54 L. J. Ch. 811.

The American courts at first found this difficulty insuperable, but their desire to enforce promises so obviously binding *in foro conscientiæ* led to the gradual adoption of various specious suggestions of consideration. See note, 16 Am. Law Reg. n. s. 548. The modern law on the subject is in great confusion and incumbered with many inaccurate statements. It is often said, as in the principal case, that the mutual promises of the subscribers form the consideration. *Petty* v. *Trustees of Church*, 95 Ind. 278. Even if it be in fact true that the subscribers give their promises in exchange for each other, the beneficiary of the subscription, who is usually the plaintiff, is not privy to the contract. *Cottage Street Church* v. *Kendall*, 121 Mass. 528. In states where a beneficiary is allowed to sue, however, a satisfactory result may be worked out on this doctrine if the facts admit of its application. Cf. *Irwin* v. *Lombard University*, 56 Oh. St. 920. But usually such a construction of the facts is false. It is also a fictitious consideration that is found in an implied counter-promise by the beneficiary, arising when the subscription is accepted or acted upon. *Maine Institute* v. *Haskell*, 73 Me. 140. A third view enforces the promise on the theory that the subscriber is equitably estopped from denying the consideration after the beneficiary has acted on the faith of it. *Beatty* v. *Western College*, 177 Ill. 280. This avoids the contractual difficulty only by substituting an infringement of the doctrine of estoppel. See 12 HARVARD LAW REVIEW, 506. The most generally accepted theory considers the subscription an offer merely, which is made binding when expense or liability has been incurred in reliance upon it. *Trustees of Church* v. *Garvey*, 53 Ill. 401.